SUPREME COURT, U.S.
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No. 71-1146

In the Supreme Court of the United States

OCTOBER TERM, 1971

EDUARDO POETA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 455 F. 2d 117.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1972. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to March 8, 1972, and on that date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the wiretap interception of the incriminating conversations between petitioner and a co-defendant, after indictment but before arraignment, vio-

lated petitioner's right to counsel and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*).

2. Whether the renewal of the wiretap order, issued June 19, 1970, was invalid because of an alleged absence of a new showing of probable cause to support the warrant.

3. Whether one who was not the party upon whose telephone the wiretap was placed has standing, as to conversations to which he was not a party, to challenge the alleged failure of the police to minimize the quantity of material intercepted.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner[1] was convicted of having illegally imported heroin (counts 1, 3, 5, 7, 9, 11, 13) (21 U.S.C. (1964 ed.) 174); having received, concealed and facilitated the transportation and concealment of heroin, knowing the same to have been illegally imported (counts 2, 4, 6, 8, 10, 12, 14) (21 U.S.C. 174); and of having conspired to violate 21 U.S.C. 174 (count 15). On March 19, 1971, petitioner was sentenced to concurrent terms of twenty years' imprisonment on each of the seven importation counts (1, 3, 5, 7, 9, 11, 13) and to concurrent prison terms of twenty years on each of the remaining counts, the latter sentences to run consecutively to those imposed under the importation counts. In addition, petitioner was fined $20,000 on each of the fifteen counts on

[1] Petitioner was tried and convicted with his co-defendant, Luis Stepenberg, who died prior to sentencing.

which he was convicted. The court of appeals affirmed (Pet. App. A. 1–11).

1. The evidence, which, for purposes of appeal, petitioner does not dispute, shows that in December 1968 one Jaime Cohen, who subsequently became a government informant, met with co-defendant Stepenberg in Brazil and there agreed to assist in transporting heroin into the United States (Tr. 310–311). Upon his return to the United States, Cohen met with petitioner and, pursuant to Stepenberg's instructions, rented a house in Forest Hills, New York (Tr. 319–323, 328–329). Cohen was told by Stepenberg that petitioner was in charge of the house, that Cohen should take all instructions regarding heroin dealings from petitioner, and that Cohen should never go to the house without specific instructions to do so from petitioner (Tr. 328–330, 338). On at least seven different occasions between June 1969 and February 1970, Cohen, acting on petitioner's instructions, went to the Forest Hills house and picked up heroin which had been imported into the country and deposited in the house. The standard procedure was for petitioner to telephone Cohen and tell him when to go to the house and inform him of the specific location of the heroin within the house. After picking up the heroin Cohen would contact a purchaser, make the sale and then advise petitioner, who would arrange to pick up the money (Tr. 340–347, 349–353, 362–365, 368–370, 383–386, 391–402, 403–406). By the time of his arrest in February 1970 Cohen had sold approximately 20½ kilos of heroin for more than $290,000 (Tr. 346, 352, 364, 370, 385, 397, 400, 402, 407).

2. Following his arrest Cohen agreed to assist local and federal law enforcement officials. In this capacity Cohen, pursuant to an instruction from Stepenberg, met petitioner on May 15, 1970, and told him that he had customers ready to purchase at least ten kilos of heroin (Tr. 494–495). Petitioner assured Cohen that the heroin was of good quality and was coming from France (Tr. 495). At a subsequent meeting later that day petitioner again told Cohen that the heroin was expected at any time and that Cohen would be notified as soon as the shipment arrived (Tr. 496). On May 20, when petitioner and Cohen met again, petitioner stated that the heroin was coming soon, warned Cohen to be careful to avoid police surveillance and instructed Cohen to avoid using the telephone (Tr. 498–500). The following day another meeting between petitioner and Cohen took place at which petitioner explained that, although the heroin was coming from France, there had been some delay and that he was uncertain whether the heroin would enter the United States through Canada or South America (Tr. 501–503).[2]

3. In addition to Cohen's testimony, Felix Martinez, who purchased heroin from Cohen on six occasions from June 1969 to January 1970, testified that he met with Cohen and petitioner in August 1969, at which time Cohen told Martinez to notify petitioner if anything happened to Cohen (Tr. 1540–1541). Sub-

[2] All of the meetings between Cohen and petitioner in May 1970 were observed and filmed by local and federal agents (Tr. 1219–1231, 1249–1250, 1251–1256).

sequently, Martinez accompanied Cohen to the Forest Hills house and there met petitioner who was carrying two kilos of heroin, which Cohen then gave to Martinez. At this meeting Martinez complained to petitioner about the quality of some heroin purchased earlier and petitioner insisted the quality was good (Tr. 1542–1545). Martinez met petitioner again in February 1970 and told him Cohen was in jail and needed bail money, but petitioner indicated he could do nothing to help Cohen for 60 days (Tr. 1547–1550).

4. After agreeing to cooperate with the police, Cohen consented to the placement of a wiretap on his telephone; the tap was subsequently installed pursuant to an order of a Justice of the New York Supreme Court on March 19, 1970 (A. App. 45a–48a, 59a).[3] As a result of information obtained from the tap on Cohen's telephone, an order was obtained from Mr. Justice Schweitzer of the same court on April 22, 1970, authorizing a wiretap on the telephone of Stepenberg's father, on the allegation that Stepenberg used this telephone (A. App. 30a–33a, 42a–43a). This order was amended on May 7, 1970, to permit the tapping of a telephone which Stepenberg had installed in his own apartment. The tap on Stepenberg's phone was reauthorized by subsequent orders of Mr. Justice Schweitzer on May 21, 1970, June 19, 1970, and July 20, 1970 (A. App. 77a–80a; 90a–93a; 100a–103a). On July 2, 1970, an indictment against peti-

[3] "A. App." refers to Appellant's [petitioner's] Appendix filed in the court below, a copy of which is being lodged with the Clerk of this Court.

tioner and Stepenberg was returned and ordered sealed. Although bench warrants for the indictees were issued at that time, execution of the warrants was delayed because the police had learned that a shipment of sixty kilos of heroin was scheduled to arrive in New York within a week or ten days (Tr. 1373–1374).

While acting pursuant to the order of June 19 the police intercepted conversations between petitioner and Stepenberg on July 10 and 11, 1970. On July 10, petitioner telephoned Stepenberg, said he was being followed, and warned Stepenberg to "desist." On the next day petitioner called Stepenberg and, using code language, discussed the expected arrival of a shipment of heroin (Tr. 1706–1713). Although he advances different grounds, petitioner's sole contention here is that his conversations of July 10 and 11 with Stepenberg were improperly admitted into evidence.

ARGUMENT

1.a. Relying on *Massiah* v. *United States*, 377 U.S. 201, *McLeod* v. *Ohio*, 381 U.S. 356, and *Beatty* v. *United States*, 389 U.S. 45, petitioner contends that, once the indictment against himself and Stepenberg had been returned, the government was required to terminate the wiretap, and that the continuation of the wiretap on Stepenberg's telephone, resulting in the interception of the conversations of July 10 and 11, violated his right to counsel. There is, however, a critical distinction between the cases relied upon by petitioner and the facts here. In *Massiah*, *McLeod* and *Beatty* the incriminating statements related to the crime charged in the indictment; here, by contrast,

conversations between petitioner and Stepenberg dealt solely with an expected shipment of narcotics and did not relate to the charges contained in the indictment, which covered only the period of June 1969–February 1970.[4] Where, as here, the intercepted post-indictment statements related to present and future criminal conduct, the rationale of *Massiah* and subsequent cases does not require exclusion of the seized conversations. See *United States* v. *Garcia*, 377 F. 2d 321, 324 (C.A. 2), certiorari denied, 389 U.S. 991; cf. *Hoffa* v. *United States*, 385 U.S. 293, 309–310; *United States* v. *Missler*, 414 F. 2d 1293, 1302 (C.A. 4), certiorari denied, 397 U.S. 913. As this Court recognized in *Massiah*, it is often proper to continue an investigation of criminal activities of an individual, even though an indictment has been returned against him. 377 U.S. at 207; see also *United States* v. *Edwards*, 366 F. 2d 853, 873 (C.A. 2). This is especially applicable in the instant circumstances where petitioner was actively engaged in the process of importing heroin into the country and was awaiting its imminent arrival.

1.b. Petitioner contends that the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*)[5] does not permit a continuation of the wiretap after an indictment is returned against those whose conversations are sought to be intercepted. Al-

[4] The conversations were properly introduced as examples of subsequent similar conduct used to show intent, design and scheme. *United States* v. *Boyd*, 446 F. 2d 1267, 1270–1271 (C.A. 5), and cases cited therein.

[5] The wiretap warrants were sought and issued under N.Y. Crim. Proc. Law Art. 700. However, as the parties have recognized throughout this proceeding, 18 U.S.C. 2516(2) requires that the state court warrants comply with 18 U.S.C. 2518.

though we agree with petitioner that the statute requires, *inter alia*, a showing of necessity for use of a wiretap (18 U.S.C. 2518(3)(c)), the necessity for the employment of the tap in this case was sufficiently shown. Furthermore, although the statute requires that a wiretap must terminate upon "attainment of the authorized objective" (18 U.S.C. 2518(5)),[6] Congress, in enacting this provision, recognized that each case must be analyzed on its own facts. See 1968 U.S. Code Cong. and Admin. News, 2112, 2192 (S. Rep. No. 1097, 90th Cong., 2d Sess.).

It is clear that the continued use of the tap was not intended to supply additional evidence to substantiate the indictment, which covered only the period of June 1969–February 1970, but sought to secure information relating to an expected shipment of narcotics. In seeking the order of June 19, 1970, which authorized the tap pursuant to which the July conversations were intercepted, the District Attorney for Queens County stated that conversations intercepted under the original wiretap order revealed that petitioner and Stepenberg expected a shipment of narcotics from Argentina, and that the shipment had been temporarily delayed (A. App. 87a–89a, 94a–98a). Thus, terminating the tap upon the return of the indictment in this case would have frustrated a legitimate police investigation of continuing criminal conduct, extending beyond the charges in the indictment.

2. Petitioner contends further that the June 19 intercept order was improperly issued because there

[6] In granting the order for a thirty-day period Mr. Justice Schweitzer provided that the tap need not "terminate when communications of the type particularly described * * * are first obtained * * *." (A. App. 92a–93a).

was no new showing of probable cause, as required by the statute (N.Y. Crim. Proc. Law § 700.40; 18 U.S.C. 2518(5)), for extension of the wiretap authorization. See *Berger* v. *New York*, 388 U.S. 41, 59. Petitioner argues that the application for the June 19 order contained no new or additional facts which had not been contained in the application for the order of May 21, 1970. No objection on this ground was made in the trial court. Petitioner does not contend here that no probable cause existed to support the June 19 order, but rather that, as a matter of law, the initial factual basis for the issuance of the warrant cannot provide the basis for its renewal thirty days later.

Although we do not believe new facts necessarily are required to be adduced in support of a showing of probable cause for an extension order, in this case such a showing was in fact made. The application for the June 19 order incorporated the May 21 affidavit of Detective Reid which related information, based on an intereception of May 16, 1970, that an expected shipment of narcotics had been delayed temporarily. The incorporation of Reid's affidavit, originally submitted in connection with the application for the May 21 order, "indicate[d] that the heroin shipment was still delayed, but also still expected. The reasonable belief that a shipment was expected was sufficient to supply the necessary present probable cause" (Pet. App. A 10).

Moreover, the affidavit in support of the order of June 19 (A. App. 94a–99a) did in fact refer to conversations overheard during the course of the wiretapping authorized by the previous order, at least one

of which (between Stepenberg and an accomplice) was introduced at trial (Tr. 1676).

3. Petitioner contends (Pet. 9–10) that the court of appeals misread *Alderman* v. *United States*, 394 U.S. 165, 176, in determining that he lacked standing to challenge the failure of the police to minimize the quantity of material intercepted in the course of the wiretap on Stepenberg's telephone (18 U.S.C. 2518 (5)). Petitioner, of course, had standing to challenge those conversations to which he was a party or which occurred on his premises (*Alderman*, *supra*, 394 U.S. at 176). But where, as here, the wiretap was directed against another and the claim is not that there was a "failure to minimize" the quantity of material intercepted from petitioner, but rather that there was unnecessary interception of conversations of another, the court of appeals correctly concluded that he lacked standing to challenge the alleged failure to minimize the interception of those conversations (Pet. App. A. 10; 394 U.S. at 173–174).

With respect to the conversations of July 10 and 11 there was no evidence that the police did not comply with the statute by failing to minimize the interception of the conversations between petitioner and Stepenberg on those dates. The conversations involved a code language, were in Spanish, dealt with narcotics and, to one unfamiliar with the code, would appear to be innocent. In such a situation the police were justified in monitoring the entire conversations.[7]

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[7] Judge Waddy in *United States* v. *Scott*, 331 F. Supp. 233, 247 (D. D.C.), relied upon by petitioner in the court below, indicated "that it may be reasonable to monitor an entire conversation between two known conspirators even if that conversation turns out to be innocent."

We point out that, in addition to all the preceding arguments, even if the conversations of July 10 and 11 should have been excluded, any error in their admission was harmless beyond a reasonable doubt in view of the overwhelming evidence of petitioner's guilt. *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250.* Completely independent of the seized conversations the jury had before it the evidence, set forth in the Statement, showing petitoner's involvement in the business of importing and distributing heroin as charged in the indictment. In view of this evidence, the wiretap evidence, limited as it was to two conversations occurring several months after the time period covered by the indictment, can not be said to have prejudiced the petitioner.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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* The question of whether the error would be harmless as to Stepenberg is not presented since Stepenberg died prior to sentencing (note 1, *supra*).

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